On the authority of these cases I am, therefore, satisfied that the defendants, by virtue of the powers conferred on them by section 16(5) of the Municipal Ordinance, were entitled to dismiss the plaintiff at pleasure and without notice. I am entirely satisfied that in so doing they acted in good faith.

The plaintiff's action must accordingly be dismissed with costs.

Order accordingly.

Solicitors: *Jag-Jit Singh; Presgrave & Matthews.*

ANTHONY SOOSAY v. PUBLIC PROSECUTOR

[A.Cr.J. (Smith J.) July 29, 1959]

[K.L. — Criminal Appeal No. 35 of 1959]

Local Authority — Nuisance notice — Service on owner of premises — Nuisance caused by adjacent building operation — Municipal Ordinance (S.S. Cap.133), s.246(6)(b) — Failure to comply with order.

In this case the appellant was the owner of the premises in question. The adjoining premises had been demolished for the erection of a new building and excavation and piling work was being done there. Cracks appeared in the appellant's premises and he instructed his solicitors to write to the Municipal Architect informing him that the premises were being damaged presumably by adjacent building operation. As a result of the letter a Building Inspector visited the premises and found several cracks in the cross walls and external walls which appeared to him to have been caused by the building operation next door. The Deputy Municipal Architect who also saw the building was satisfied that the cracks in the building were structural defects and constituted a nuisance. Consequently a notice under section 246 of the Municipal Ordinance was sent to the appellant as owner of the premises. On subsequent visits it was found that a few cracks in the walls had been plastered up and that what had been done did not amount to compliance with the notice. On these facts the appellant was convicted by the Magistrate.

On appeal it was contended for the appellant that since it was clear from the prosecution case that the person directly responsible for the nuisance was the firm of builders carrying out the demolition, that fact provided a complete defence to the charge against him. It was argued that when the person responsible for creating the nuisance was known to the local authority, the local authority could not obtain a conviction against the occupier or owner of the house even though such person had been served with a notice under this section and had made default in complying with any of its requisitions within a specified time.

Held: the order which had to be complied with in this case was to do certain works on the premises in question. If the notice which was served on the appellant had been served upon the building contractor whose activities caused the defects he might not have been able to comply with the order because he had no right to enter upon the premises. In the circumstances of the case the appeal must be dismissed.

Observations on the need to modernise the law relating to nuisance.

Cases referred to:—

(1) *Andrew* v. *St. Olave's Board of Works* [1898] 1 Q.B. 775 at p. 781.

(2) *Scarborough Corpn.* v. *Scarborough Sanitary Authority* (1876) 34 L.T. 768.

MAGISTRATE'S CRIMINAL APPEAL.

A. K. Sen for the appellant.

J. A. B. Lang for the respondent.

Cur. Adv. Vult.

Smith J.: The appellant was convicted by the Kuala Lumpur Magistrate on the following charge and fined $100:—

"That you make default in complying with Nuisance Notice No. 22 dated 20/9/58 duly served on you on 22/9/58 within the time specified, i.e. to shore up the cracked pillars which must be repaired to a stable condition, to bond in cracked walls with granite bondstones set in strong cement mortar, and to repair windows and doors at premises No. 1, Batu Road, Kuala Lumpur forthwith from the service of the said notice, and that you thereby committed an offence punishable under section 246(6)(b) of the Municipal Ordinance Cap. 133 of the Straits Settlements as applied to the Malay States including the Municipality of Kuala Lumpur vide the Municipal Ordinance (Extended Application) of 1948."

He has appealed against his conviction.

The appellant is the owner of premises No. 1 Batu Road. The adjoining premises in Mountbatten Road had been demolished for the erection of a new building. Cracks appeared in the premises which the appellant attributed to the demolition work next door. The appellant's solicitor wrote to the Municipal Architect informing him that the premises were being damaged presumably by the excavation and piling work being done next door. On 20th September. 1958, as a result of the letter, a Building Inspector visited the premises and found several cracks in the cross walls and external walls which appeared to him to have been caused by the building operation next door. The Deputy Municipal Architect who also saw the building was satisfied that the cracks in the building were structural defects and constituted a nuisance. The cracks were on cross walls and external walls on the ground floor, first floor and second floor.

On 22nd September 1958 a notice under section 246 of the Municipal Ordinance was sent to the appellant as owner of the premises.

On subsequent visits it was found that a few cracks in the walls had been plastered up and that what had been done did not amount to compliance with the notice. All the following facts were established by the prosecution evidence and on these facts the Magistrate convicted the appellant.

The appellant chose to say nothing and the whole of his case was a submission that on the facts as they stood he was entitled to an acquittal.

Mr. Sen has argued for the appellant that since it is clear from the prosecution case that the person directly responsible for the nuisance was the firm of builders carrying out the demolition, that fact provides a complete defence to the charge against him. The argument is that when the person responsible for creating the nuisance is known to the local authority the local authority cannot obtain a conviction

against the occupier or owner of the house even though such person has been served with a notice under this section and has made default in complying with any of its requisitions within a specified time.

The authority for this proposition is part of the judgment of Lord Russell of Killowen C.J., in *Andrew* v. *St. Olave's Board of Works*,[1] at page 781.

In this judgment the learned Chief Justice was considering section 4 of the Public Health (London) Act, 1891, which is for all practical purposes reproduced in section 247 of the Municipal Ordinance. Its facts are as follows. The drainage of two adjoining houses situate in the metropolis being so defective as to be a nuisance, the sanitary authority served a notice under Public Health (London) Act, 1891 (c. 76), section 4(1) (repealed), upon the owner of the houses requiring him to abate the nuisance. The drainage of the houses was carried away by means of a single pipe, and the owner, being under the belief that this combined system of drainage had been authorised by an order of the sanitary authority, and that the liability to repair the pipe consequently lay upon him under the provisions of the Metropolis Management Act, 1855 (c.120), executed the works prescribed by the notice. In fact, the combined plan of drainage had not been authorised by any such order, and the liability to repair the pipe was by that Act imposed upon the sanitary authority. On discovery of the mistake he sought to recover from the sanitary authority the expense he had incurred.

This case, therefore, is not a criminal case but is a civil case arising out of an incorrect notice issued by the sanitary authority. In the course of his judgment the learned Chief Justice said:—

"It was contended on behalf of the defendants that that section does not empower the Magistrate, before whom a complaint of non-compliance with an abatement notice is laid, to fine the person on whom the notice was served unless there is clear proof that that person was legally responsible for the existence of the nuisance. But with that I do not agree. Though far from suggesting that it is not matter of defence to such a complaint to shew that some other person and not the person served was responsible for the nuisance, I think that, in the absence of production by the persons summoned of evidence to that effect, the Magistrate has jurisdiction to inflict a penalty on mere proof of non-compliance with the notice. In other words, I look upon the section as putting upon the person served, not for all time, but *prima facie* and for the time being, the liability to do what it is necessary should promptly be done, leaving the question of his ultimate liability to be dealt with subsequently."

On this authority Mr. D. K. Walters in his "Municipal Ordinance of the Straits Settlements" has said: "An occupier or owner may be the person primarily liable to be served as the person responsible in fact, but the occupier or owner may only be served as such if the person responsible in fact cannot be found" — see page 336. However, at page 337 he does say: "If the cause is a structural defect, he (that is, the owner) must abate the nuisance — see section 246(3)."

The Public Health (London) Act, 1891 was repealed in 1936 and it is difficult now to trace authorities relating to its application. It is to be noted, however, that in the first edition of *Halsbury's Laws of England* published in 1915 *Andrew's* case is only given as an authority for aspects of the law relating to contract and sewers. It is not authority for the criminal liability of the owner of premises.

In the 1954 replacement volume of the *English and Empire Digest*, Volume 36, under the title "Nuisance," under the sub-head "Nuisance contributed to by other persons" at page 339 there is no reference to *Andrew's* case which is referred to solely as an authority for recovery of expenditure by a person not liable to do necessary works.

It is mere speculation as to what exactly Lord Russell had in mind when he said that he was "far from suggesting that it is not a matter of defence to such a complaint to show that some other person and not the person served was responsible for the nuisance."

It must be borne in mind that if the notice which was served on the appellant had been served upon the building contractor whose activities caused the defects he might not have been able to comply with the order because he had no right to enter upon the premises. It would have been appropriate to order him to cease creating the nuisance but not to abate it because he had no right to enter the appellant's property — see *Scarborough Corporation* v. *Scarborough Sanitary Authority*,[2] noted in *English and Empire Digest*, Volume 36. pages 339-40. The order which had to be complied with in this case was to do certain works on premises No. 1 Batu Road. Section 246(3) of the Municipal Ordinance required that the notice be served on the owner. Sub-section (6) imposed a penalty on any person who makes default in complying with the order. This seems to me to be perfectly clear. No local case applying *Andrew's* case could be quoted to me. Section 246(1) is of general application. Section 246(3) arises only when the nuisance is of a structural character or where premises are unoccupied. It is to be noted that Mr. D. K. Walters does not attempt to apply *Andrew's* case to section 246(3). I regard *Andrew's* case as entirely *obiter* and apparently applicable to some particular circumstances which Lord Russell had in mind. Indeed. he may only have meant that the liability of another person for the nuisance might have been a matter to take into consideration when assessing sentence.

The English authorities upon which we are obliged to rely are now very old. The Public Health (London) Act long ago outlived its usefulness and was replaced. It is a matter for consideration by the appropriate authority whether the Municipal Ordinance also requires modernisation particularly with regard to the law relating to nuisance.

The appeal is dismissed.

Appeal dismissed.

Solicitors: *Sen & Lim; Shearn, Delamore & Co.*